

CANADA / JUDGMENT

T.A.I. v. D.R.M.

2023 BCSC 2155

COURT

Supreme Court of British Columbia

DECIDED

6 December 2023

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2023 BCSC 2155 T.A.I. v. D.R.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

T.A.I. v. D.R.M.,

2023 BCSC 2155

Date: 20231206

Docket: E58482

Registry: New Westminster

Between:

T.A.I.

Claimant

And

D.R.M.

Respondent

Before: The Honourable Justice Matthews

Reasons for Judgment

In Chambers

Counsel for the Claimant:

F. Jhuty

S. Saran

The Respondent, appearing in person:

D.R.M.

Place and Date of Hearing:

New Westminster, B.C.

October 17, 2023

Place and Date of Judgment:

New Westminster, B.C.

December 6, 2023

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Overview

- [1] Pursuant to a consent order made in September 2021 (the "September 2021 order") T.A.I. and D.R.M. were divorced and a final order pertaining to ancillary relief including parenting, child support and spousal support was made.

- [2] At the time of the September 2021 order, the parties' daughter, E.M., was residing with the claimant T.A.I. in 108 Mile Ranch. The September 2021 order provided for that issue to be re-addressed by June 30, 2022. D.R.M. position is that beginning in May 2022, E.M. expressed the desire to move back to Port Moody and reside with the respondent, D.R.M. Although T.A.I. does not contest that E.M. should reside primarily with D.R.M., the parties have not formally agreed upon that and the consequent issues of child support and parenting time.
- [3] T.A.I. asserts that her pre-separation health was fragile and has worsened since. She does not object to E.M. having primary residency with D.R.M. but she asserts that due to her health, debt she incurred as a result of the separation, and costs of travelling for parenting time with E.M., she meets the criteria for undue hardship and should be relieved of her child support obligations. She also asserts that her spousal support should be increased and extended due to her health.
- [4] The parties have brought cross applications pertaining to these issues. Some of the relief sought is not contested. The contested issues on the applications are:
- a) when E.M. began primarily residing with D.R.M.;
 - b) when T.A.I. shall have parenting time with E.M., although most of this is agreed to;
 - c) whether T.A.I. shall pay for all of E.M.'s travel to have parenting time with her;
 - d) an order varying the child support provided for in the September 2021 order such that D.R.M.'s child support obligations end on the date that he asserts E.M. began primarily residing with him in July 2022 and providing for T.A.I. to pay child support in July 2022;
 - e) whether due to undue hardship, T.A.I. should be relieved of an obligation to pay base child support and s.7 costs pertaining to dental costs and orthodontics;
 - f) whether there has been a material change in circumstances entitling T.A.I. to increased spousal support due to her health on an indefinite basis; and
 - g) other financials issues:
 - i. an RRSP rollover provided for in the September 2021 order;
 - ii. dental costs incurred by T.A.I.;
 - iii. costs from the application pertaining to the September 2021 order.

Background to the September 2021 order and Matters Since Then

- [5] The parties separated in March 2019 after a relationship of almost 13 years, almost 12 years of which they were married. They had one child, E.M., who was born June 15, 2008. She was 13 when they made the September 2021 order. She is 15 now. T.A.I. has a son, D., from a previous marriage who resided with the parties during their relationship and now resides with D.R.M. He is 21. During their relationship, the parties, D. and E.M. resided in Port Moody. In June 2021, T.A.I. moved to 108 Mile Ranch.
- [6] T.A.I. is 49 years old. D.R.M. is 46 years old.
- [7] T.A.I. reached an earlier consent order in November 2020 pertaining to interim child support, interim spousal support, and that D.R.M. would buy T.A.I. out of the family home (the "November 2020 order"). I understand that the parties acted in accordance with the November 2020 order although T.A.I. alleges that her payout of her interest in the family home was not made in a timely manner, causing her to have to go into debt.
- [8] There has been trouble with the September 2021 order since it was agreed to. Despite being signed by counsel for both parties, it was not entered. T.A.I. applied to have it set aside. She was not successful. Justice Gibb-Carsley ordered it to be entered on May 12, 2022. T.A.I. deposed that its terms have caused great financial prejudice to her.
- [9] The September 2021 order provides that:
- a) The parties shall be joint guardians and share s.40 Family Law Act parenting responsibilities of their daughter, E.M.;
 - b) E.M. was to primarily reside with the claimant, T.A.I., in 100 Mile House from September 7, 2021 until January 2022 or June 30, 2022, with the respondent, D.R.M., having parenting time during the school winter break, spring break, once a month during the other months;
 - c) D.R.M. was to have parenting time with E.M. for five weeks in July and August 2022;
 - d) By June 30, 2022, or earlier, if E.M. wanted to return to the Lower Mainland before June 30, 2022, the parties were to discuss and determine E.M.'s residency;
 - e) D.R.M. 's Federal Child Support Guidelines child support of \$1,294 per month was reduced to \$1,000 per month starting October 1, 2021 taking into account the increased costs for travel to have parenting time with E.M.;
 - f) Between September 2021 and June 2022, T.A.I. would drive E.M. back and forth from 100 Mile House to the Lower Mainland a minimum of 6 times;
 - g) The following were agreed to be special and extraordinary expenses for E.M.:
 - i. the portion of medical and dental insurance premiums attributable to her;
 - ii. health related-expenses that exceed insurance reimbursement by at least \$100 annually;

- iii. extracurricular activities agreed to by the parties;
 - iv. expenses for post-secondary education; and
 - v. other expenses must be agreed to between the parties, in advance, in writing including text or email prior to the expense being incurred.
 - h) The parties agreed to share special and extraordinary expenses provided for in the order with the claimant paying 30% and the respondent paying 70%. The amount to be shared was to be the expense after deducting tax benefits, deduction or subsidies associated with the expense.
 - i) D.R.M. was to pay spousal support to T.A.I. commencing October 1, 2021 until and including September 1, 2025 in the amount of \$1688 per month.
 - j) D.R.M.'s RRSPs were to be equalized with T.A.I. through a spousal rollover pursuant to the Income Tax Act.
- [10] I note the September 2021 order refers to T.A.I. and E.M. residing in and travelling to and from 100 Mile House. I understand that T.A.I.'s home is actually in 108 Mile Ranch. Neither party takes issue with this difference between the wording of the September 2021 order and the reality. I will refer to T.A.I.'s residence in 108 Mile Ranch.
- [11] The September 2021 order provided for E.M. to reside with T.A.I. for a time period up to the 2021-2022 school year, subject to E.M. expressing a wish to return to Port Moody. D.R.M. initially opposed that and brought an application to prevent the relocation, but ultimately agreed to it on a trial basis. D.R.M. deposed that in April 2022, E.M. told him that she intended to return to Port Moody and live with him. D.R.M. deposed that in May 2022, he attempted to commence communications with T.A.I. about that, in accordance with the September 2021 order, but T.A.I. replied that she would not discuss matters without her lawyer.
- [12] T.A.I. retained counsel who, on July 22, 2022, proposed that T.A.I. and D.R.M. agree that E.M. would be primary resident with D.R.M. in Port Moody commencing September 1, 2022 and proposed parenting time for T.A.I. D.R.M. responded agreeing but with the caveat that E.M.'s residency be changed effective August 1, 2022 since E.M. had commenced living with him full time on July 26, 2022.
- [13] D.R.M. deposed that he has not made child support payments starting August 1, 2022 since E.M. started living with him full time on July 26, 2022. By this, I understand that he means that the last child support payment he made was on July 1, 2022. D.R.M. deposed that he advised T.A.I. and Family Maintenance Enforcement Program of that at the time.

- [14] Despite these communications, including between counsel for T.A.I. and D.R.M. about where E.M. be resident for the 2022-2023 school year and parenting time, T.A.I. deposed that she was surprised to learn, in August 2022, that D.R.M. had registered E.M. for school at Heritage Woods Secondary, the high school near their Port Moody home. She asserts that he did so without her knowledge or consent.
- [15] D.R.M. deposed that after the July and August 2022 communications with T.A.I.'s lawyer, he heard nothing further about primary residence until September 2, 2022 when T.A.I., no longer represented, filed an application seeking the Court to determine E.M.'s primary residence.
- [16] T.A.I. filed two applications, one dated September 2, 2022, and the other, without notice, filed September 7, 2022. Both sought to address E.M.'s primary residence for the coming school year on an urgent basis as well as several other matters. In the September 2, 2022 application she did sought an order that E.M.'s residence be determined, but she did not seek an order that E.M.'s primary residency be in 108 Mile Ranch. In the September 7, 2022 without notice application, she sought an order that E.M.'s residence continue to be with her on an interim basis until it could be determined. She proceed with the without notice application but the Court ordered that she serve D.R.M. Subsequent to that, she did not proceed with either of those applications. Her current application was filed February 23, 2023.
- [17] D.R.M. deposed that in September 2022, T.A.I. twice picked up E.M. and took her to 108 Mile Ranch, requiring D.R.M. to pay for flights to return her to the Lower Mainland. D.R.M. deposed that the costs of the flights were \$628 for both flights. He deduced this amount from T.A.I.'s spousal support payment on October 1, 2022. He deposed that Family Maintenance Enforcement Program forced him to repay this amount in December 2022 which he did.
- [18] D.R.M. deposed that he attempted to discuss matters further with T.A.I. directly but she refused and told him that he would have to wait until she had a new lawyer. D.R.M. deposed that he later learned that T.A.I. had retained a new lawyer in September 2022 but he had not heard from her. He called T.A.I.'s new lawyer in November 2022 and she sent D.R.M. T.A.I.'s proposal, which again was that E.M. be primarily resident in Port Moody and T.A.I. have certain scheduled parenting time over the year. The parties exchanged views on other details of parenting including costs of E.M.'s travel for parenting time with T.A.I., the ability for T.A.I. to have unscheduled parenting time, child support payable by T.A.I. pursuant to the Federal Child Support Guidelines, SOR/97-175.

Parenting

- [19] The best interests of E.M. determine where she should be resident and what parenting time she should have with each parent.

- [20] On the issue of residency and where she attends school, the evidence is that after T.A.I. moved to 108 Mile Ranch, E.M. wanted to try living there with her and D.R.M. reluctantly agreed to try it for a year. D.R.M.'s evidence is that near the end of the that year, which was near the end of the 2021-2022 school year, E.M. expressed to that she wanted to move back to Port Moody and attend Heritage Woods Secondary. While T.I.T.A.I. has taken issue as to whether her consent for this move was obtained and whether she knew about the choice of school, she has not led any evidence that this is an inappropriate choice or school or place for E.M. to reside.
- [21] T.A.I. deposed that E.M. expressed to her that she was not sure whether she wanted to go to Heritage Woods Secondary School in September 2022. T.A.I. deposed that E.M. stayed with her for two weeks in September 2022, the second week ended October 2, 2022. According to T.A.I., at that time E.M. told her that she wanted to go to Heritage Secondary and live in Port Moody.
- [22] Accordingly, both parties have deposed to what E.M. told about her wishes for the 2022-2023 school year although they have deposed to those expressions being made a different time.
- [23] D.R.M.'s information from E.M. led him to address E.M.'s residency for the next school year in May 2022. As related above, T.A.I. refused to discuss it with D.R.M. directly but a few months later her lawyer wrote proposing a parenting schedule for the coming year which included that E.M. reside in Port Moody.
- [24] T.A.I.'s evidence that she did not agree to E.M. being resident in Port Moody before the school year began and her assertion that she did not know that E.M. would be attending Heritage Woods Secondary School does not make sense. While she also deposed that E.M. expressed uncertainty about the school in September 2022, T.A.I. does not explain her surprise or her assertion that she did not consent given that she had proposed that E.M. be resident in Port Moody in a letter sent to D.R.M. in July 2022. There is no evidence that Heritage Woods Secondary was not the school that E.M. should attend for some reason, given T.A.I.'s proposal that E.M. reside in Port Moody.
- [25] The evidence as a whole satisfies me that both parties had agreed, by the summer of 2022, that E.M. would be primarily resident in Port Moody for the coming school year and were working out the parenting time that E.M. would have with T.A.I. over that year. That has occurred and E.M. has continued to reside there through the start of the 2023-2024 school year.
- [26] Both parents have shown willingness to allow E.M.'s views to play a major role in where she lives. However, given the ongoing conflict between the parties, I am of the view that a time limited residency order is no longer appropriate. It is in E.M.'s best interests to have stable residency. I order that her primary residence be with D.R.M. subject to further order of the court or agreement by the parties.

- [27] The parties do not agree on the date when E.M. began residing in Port Moody. The driver for the difference is financial. When E.M.'s residency changed, T.A.I. was no longer entitled to receive child support of \$1,000 per month pursuant to the September 2021 order, she was no longer entitled to receive the child tax benefit of \$455 per month, and, subject to reduction or elimination of child support pursuant to her claim of undue hardship, she was required to pay child support. Her child support payment based on her 2021 income would be approximately \$295, for a total swing of \$1,750 per month.
- [28] I am of the view that the financial circumstances should be considered as part of the undue hardship analysis. They should not drive the analysis of when E.M.'s residency changed.
- [29] D.R.M. asserts that E.M.'s residency changed on July 26, 2022, when E.M. began five weeks of agreed upon summer parenting time with him, at which time they were discussing her residency in Port Moody for the coming school year. T.A.I. asserts that E.M.'s residency did not change until October 2, 2022 because she had not agreed to the change and because E.M. was not certain that she would make the change until that date.
- [30] In my view, the evidence discloses that E.M. may have had uncertainty about her new school in September 2022 but the evidence does not go further than that to negate the discussions about where her residency would be for that school year. Despite the parties' willingness to allow E.M. views to influence the matter, it was their decision that, in the September 2021 order, they had agreed to review by June 30, 2022.
- [31] By that time, E.M. had expressed the view to D.R.M. that she wanted to return to Port Moody for the next school year. D.R.M. attempted to address it before the June 30, 2022 date but T.A.I. refused. When she did address it, through her lawyer's letter in July 2022, her proposal was that E.M. be primarily residence with D.R.M. commencing September 2022. D.R.M. replied that it should be August 1, 2022, because by then, E.M. was already residing with him.
- [32] When parties make orders by consent, or the court makes orders after contested applications or trial, they should be complied with. Had the parties addressed the matter by June 30, 2022 as the September 2021 order required and as D.R.M. attempted, the matter would have been settled. T.A.I.'s unilateral refusal to address it in a timely manner should not be permitted to affect the date that the residence changed, especially from when it actually changed as demonstrated by the evidence.
- [33] At any rate, both parties knew that E.M. would have five weeks of vacation with D.R.M. in the summer. By August 1, 2022, E.M. was living with D.R.M. in Port Moody as her summer parenting time with D.R.M. began on July 26, 2022 and ran into the beginning of the school year.
- [34] Taking all of this into account, I declare that E.M. has been primarily resident with D.R.M. since August 1, 2022.

- [35] On this application, the parties agree on monthly parenting time between T.A.I. and E.M. as has T.A.I. They agree on most of the following dates for the period after the application was argued (on October 17, 2023) through the end of 2024 and to see a Family Justice Counsellor by the end of July 2024 to attempt to agree on dates for 2025 based on the following model:
- a) November 10-12, 2023 in 108 Mile Ranch;
 - b) December 21-30, 2023 in 108 Mile Ranch;
 - c) Once per month in 108 Mile Ranch from January 2024 to November 2024;
 - d) T.A.I. will have five weeks of parenting time with E.M. over the summer based on dates to be agreed upon by April 1 of each year subject to E.M.'s wishes and school schedule.
 - e) Starting in December 2024, they will rotate Christmas parenting time as follows:
 - i. E.M. will have parenting time with T.A.I. on Christmas Day on odd years and with D.R.M. on even years;
 - ii. T.A.I. will have 9 consecutive days of parenting time during Christmas Holidays with the time and date to be agreed upon on or before November 15 of the same year.
- [36] The date that they do not agree on is the time that E.M. will be with T.A.I. in 108 Mile Ranch over Christmas. T.A.I. wants it to start December 21 and D.R.M. wants it to start December 23. The last day of school is December 22. I order that E.M.'s parenting time with T.A.I. be from December 23, 2023 to January 1, 2024 so that the parenting time is 9 consecutive days which both parties have agreed is generally appropriate for the Christmas holidays.
- [37] T.A.I. also seeks an order that she have unlimited parenting time with E.M. when T.A.I. is in the Lower Mainland and that she address that with E.M. directly. D.R.M. is agreeable to T.A.I. having additional parenting time when she comes to the lower Mainland so long as he has seven days notice. He objects to not having notice because if he has made plans with E.M. or arranged his work shifts around parenting E.M., the lack of notice is disruptive.
- [38] I see no downside to T.A.I. giving D.R.M. seven days notice of parenting time with E.M. in the Lower Mainland in addition to the parenting time above. There is nothing to preclude T.A.I. to arrange it with E.M., but she should also give D.R.M. notice.
- [39] With regard to travel mode and costs, T.A.I. proposes that she pay for E.M.'s travel from Port Moody to 108 Mile Ranch and D.R.M. pay for 12 return flights per year for E.M.'s travel from 108 Mile Ranch based on T.A.I. providing two weeks notice of the dates. If D.R.M. books flights back to Vancouver out of Williams Lake, T.A.I. proposes that she will arrange to get E.M. to Williams Lake.
- [40] D.R.M. proposes that E.M. fly back and forth for parenting time and the parties share the costs evenly, or T.A.I. bear all of the costs and is entitled to reduced child support for doing so.

- [41] There is not much evidence about E.M.'s interests from either parent pertaining to the mode of travel. I presume both parents are satisfied that either flying or driving are equally beneficial to her.
- [42] With regard to mode of travel and travel costs, the September 2021 order provided for D.R.M. to have monthly parenting time with E.M. while E.M. resided in 108 Mile Ranch with T.A.I. Taking into account the travel costs of parenting, D.R.M.'s child support was reduced by \$294 per month. T.A.I. agreed to drive E.M. and from the Lower Mainland at least six times during the year. I understand that the reduction in child support was a recognition that D.R.M. would pay for the costs of travel on the occasions that T.A.I. did not drive E.M. to and from the Lower Mainland.
- [43] D.R.M. asserts that their prior attempts to sharing the costs and burden of driving and flying E.M. back and forth for parenting did not work in practice. He asserts that they would agree to meet in Lytton, which is roughly half way, but sometimes T.A.I. would advise him that she could not drive due to her health and he would have to do the whole drive. He asserts that T.A.I. did not meet her commitment to do six full return drives. T.A.I. asserts that D.R.M. had the benefit of the reduction of the \$300 per month off child support but did not spend that amount on travel for parenting time with E.M. and she, T.A.I., bore most of the financial burden of that year.
- [44] I cannot resolve the evidentiary debate but it does support the proposition that a simpler more predictable structure will be beneficial. It also supports the notion that when T.A.I. had primary parenting, she agreed to bear a significant burden of the travel expenses through D.R.M.'s reduced child support payments and through committing to driving both ways at least six times (or half the number of visits).
- [45] The evidence is that in September 2022, a flight from, I presume, Williams Lake, to Vancouver was about \$315. I assume there has been some inflationary increase to that cost. I presume a flight is now about \$400. Accordingly, for a full year, if E.M. were to fly both ways, the flight costs would be \$9,600 plus the costs of getting E.M. between Williams Lake and 108 Mile Ranch twice per month, a distance of about 150 kms round trip.
- [46] T.A.I.'s proposal, that she arrange for E.M.'s transportation to 108 Mile Ranch and D.R.M. arrange for flights home makes sense in that it roughly divides the burden of the travel evenly, something D.R.M. proposes albeit in the form of the E.M. flying both ways and the parties sharing the costs evenly. The fact that T.A.I. wants the flexibility to either fly E.M. or drive with her is not objectionable.

- [47] There is a logistical problem because T.A.I. proposes that she provide 14 days notice of when the travel home will take place. This could put upward pressure on airfare costs and/or make it more difficult to find air travel. It can also cause unnecessary conflict in a situation where the conflict has unfortunately not receded since the parties attempted to resolve matters. That is not always avoidable, but if the conflict can be avoided, especially if it is about E.M.'s parenting time, that will be in E.M.'s best interests.
- [48] I am of the view that the parties should share the burden of E.M.'s travel as T.A.I. proposes with one exception that I will explain shortly. I am of the view that this structure is appropriate because in the September 2021 order the parties both agreed to share the burden and D.R.M. received a \$300 per month in reduction to child support. As I will discuss, I consider that T.A.I.'s shared burden of the travel expenses does place undue hardship on her and I will address that under child support.
- [49] T.A.I. shall be responsible, by means she shall decide, for E.M.'s travel from Port Moody to 108 Mile Ranch for parenting time with T.A.I. This will allow T.A.I. the flexibility to drive or provide for E.M. to fly. This flexibility may allow her to arrange trips around her medical appointments and/or her ability to drive.
- [50] D.R.M. shall pay for the costs of E.M. to fly from Williams Lake or another airport proximate to 108 Mile Ranch when she is to return from parenting with T.A.I. The exception to T.A.I.'s proposal in this regard is that T.A.I. shall provide at least 30 days notice of the days on which E.M. will require a flight out of Williams Lake or some other airport proximate to 108 Mile Ranch so that D.R.M. has the time to make reasonably cost-efficient arrangements and to address his own work schedule regarding E.M.'s planned date to arrive back in Port Moody.
- [51] In addition, in order to reduce the stress and conflict of surprises over the dates, T.A.I. shall also provide 30 days notice to D.R.M. of when E.M. will commence parenting time with her in 108 Mile Ranch, and if she arranges for E.M. to fly, to provide the details of each flight within 48 hours of it being booked.

Child Support

Basic Child Support

- [52] It is well established that whether under the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.) or the Family Law Act, S.B.C. 2011, c. 25, child support is the right of the child, and each parent has an obligation to ensure that appropriate child support is paid. Child support in accordance with the Federal Child Support Guidelines is mandatory under the Divorce Act.

- [53] The basic child support provisions provide for child support to be determined based on the total income line of the payor's income tax return, the number of children, and the province of residence. The presumptive child support payable is set out in provincial tables. In most cases, the parties use their prior year tax returns to determine basic child support for any given year but make the adjustments mid-year due to tax returns generally being exchangeable before June 30 of the year following to which they pertain.
- [54] In this case, T.A.I. has filed two F8 financial statements pertaining to her 2021 income. In one, her income for child support purposes is \$28,149. In the other, it is \$31,530. The difference is that in the lower income, a portion of her CPP disability payment is attributed to E.M.
- [55] The range of child support payable by T.A.I. is \$255.31 - \$294.41 per month for August through December 2022, depending on which of these two incomes is applicable. It is not known what her 2023 child support obligations would be as she has not delivered an F8 appending her 2022 income tax return. However, the historical tax information shows that her disability income is reasonably steady at around \$30,000 per year and so I do not expect that there will be much fluctuation. Nevertheless, T.A.I. should have delivered an updated F8 showing her 2022 income before this application was heard in October 2023.
- [56] Section 10 of the Federal Child Support Guidelines provides as follows:

Undue hardship

10 (1) On either spouse's application, a court may award an amount of child support that is different from the amount determined under any of sections 3 to 5, 8 or 9 if the court finds that the spouse making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship.

- (2) Circumstances that may cause a spouse or child to suffer undue hardship include the following:
- (a) the spouse has responsibility for an unusually high level of debts reasonably incurred to support the spouses and their children prior to the separation or to earn a living;
 - (b) the spouse has unusually high expenses in relation to exercising parenting time with a child;
 - (c) the spouse has a legal duty under a judgment, order or written separation agreement to support any person;
 - (d) the spouse has a legal duty to support a child, other than a child of the marriage, who is
 - (i) under the age of majority, or
 - (ii) the age of majority or over but is unable, by reason of illness, disability or other cause, to obtain the necessities of life; and

- (e) the spouse has a legal duty to support any person who is unable to obtain the necessities of life due to an illness or disability.
- (3) Despite a determination of undue hardship under subsection (1), an application under that subsection must be denied by the court if it is of the opinion that the household of the spouse who claims undue hardship would, after determining the amount of child support under any of sections 3 to 5, 8 or 9, have a higher standard of living than the household of the other spouse.
- [57] There are two steps to the analysis. The first is whether payment of table of amounts of child support would cause undue hardship because of one or more of the circumstances set out in s. 10(2). The second is whether, if that has been established, to negate the possibility that relieving the spouse of all or part of child support payments would result in a higher standard of living than the spouse who should be receiving the child support. The burden is on the spouse claiming undue hardship on both steps: *Kelley v. Kelley*, 2011 BCCA 173 at para. 33.
- [58] If both steps are met, the court has a discretion to lower the amount of child support. This discretion is a narrow one that should be exercised cautiously because it could undermine the predictability and consistency objectives of the Federal Child Support Guidelines.
- [59] T.A.I. asserts that her disability and delays in dividing assets and properties in this matter have caused her to assume crippling debt. She has made a consumer proposal to deal with it. She asserts that if she has to pay child support, she cannot avoid bankruptcy. Coupled with the costs of travelling back and forth for E.M.'s parenting time, T.A.I. asserts undue hardship that should relieve her of any responsibility to pay child support.
- [60] D.R.M. submits that when T.A.I.'s separation date financial statement is compared with her most recent financial statement, it can be seen that almost all of her debt was accumulated post-separation. T.A.I.'s debt at separation was a car loan in the amount of \$42,000 and a MasterCard balance of \$1,300.
- [61] T.A.I.'s 2023 F8 shows that T.A.I. has \$86,594.76 of debt other than her mortgage. Based on the information provided in her F8, \$19,000 is the same car loan. The MasterCard now has a balance of \$11,500. There is no evidence that the pre-separation debt of the car loan and the small Master Card balance was incurred to support her, D.R.M. and E.M. The car loan pertains to a vehicle she kept after separation.
- [62] Accordingly, T.A.I.'s unsecured debt has doubled since separation. If the reduction of the car loan is taken into account, her new debt is \$66,000 of her \$87,000 in unsecured debt.
- [63] These circumstances do not meet the language of s. 10(2)(a) of the Federal Child Support Guidelines.
- [64] T.A.I. asserts that s. 10(2)(b) applies, and it is the high costs of travel for parenting time that give rise to the undue circumstances.

- [65] In my view, given that T.A.I.'s disability income is about \$30,000 per year, and one half of the costs of travel for parenting time for E.M. would be about \$5,000 if E.M. were to fly, and given the cost of fuel to drive a 1200 km round trip, s. 10(2)(b) is engaged.
- [66] The September 2021 order provided for D.R.M. to pay child support while E.M. was living with T.A.I. at 108 Mile Ranch. That order also provided a structure for sharing travel costs, as described above. The order also provided that D.R.M.'s child support would be reduced by \$294 per month due to D.R.M.'s share of those costs. D.R.M.'s income is three times that of T.A.I., albeit he pays significant spousal support.
- [67] Nonetheless, the child support that T.A.I. would be required to pay based on the applicable table is about the same amount by which the parties previously agreed to reduce D.R.M.'s child support to take into account travelling costs for parenting time. Given that one half of the costs of travel for parenting time was acknowledged by both parties to warrant a reduction in D.R.M.'s child support payments when E.M. was primarily resident with T.A.I., then it is logical that T.A.I.'s share of those costs, when she is not receiving child support but is the payor of child support on a much lower income, amounts to undue hardship that warrants a reduction.
- [68] I am satisfied that the first step of the test is met.
- [69] On the second step of the test, the comparison of standards of living, I accept that T.A.I.'s debt is as burdensome as she describes. While I do not accept that it arises from the marriage, she has the debt and it affects what she can afford to do each month. D.R.M. asserts that given that T.A.I. has an adult cousin, living with her but not paying rent, T.A.I. cannot assert that her circumstances are as dire as they are. That point is well taken, and I will address it below with regard to spousal support.
- [70] Nevertheless, T.A.I. has deposed that her circumstances are such that she has had to make a consumer proposal. She deposed that she eats cereal for lunch and dinner sometimes because she cannot afford food. She must make ends meet while making the required payments under her consumer proposal, otherwise she will lose her home. Those are the circumstances pertaining to the standard of living at T.A.I.'s home at this time when she is not making child support payments. If she is required to make them, she will either grow arrears with FMEP, or her standard of living will decrease further, or she will go into bankruptcy. There is no evidence that such constrained circumstances exist in D.R.M.'s home.
- [71] T.A.I. has also deposed that despite not paying child support, she has found the costs of travelling to the Lower Mainland to see E.M. challenging and the costs of bringing E.M. to 108 Mile Ranch challenging. She deposed that she has no money for any other travel. She deposed that E.M. has traveled with D.R.M. to Disney Land, Hawaii and Disney World over the last year. She deposed that D.R.M. and E.M. ski at Whistler. She deposed that D.R.M. has a boat and dirt bikes for the E.M. and T.A.I.'s older son.

- [72] I am satisfied that the second step of the undue hardship analysis has been met. While it is not fair to lay the problem at the feet of D.R.M., the evidence is that T.A.I. has accumulated significant debt. While that debt does not meet the s. 10(2)(a) criterion, it is real and it has detrimentally affected her standard of living. The travel expenses involved in parenting time with E.M. are significant. If it can be avoided, T.A.I.'s financial circumstances should not be permitted to interfere with her ability to having parenting time with E.M. The evidence is that relieving T.A.I. of basic child support payments will not result in a better standard of living in T.A.I.'s home than in D.R.M.'s home.
- [73] In addition, I am persuaded that the parties laid the foundation for relief against child support in that order when D.R.M.'s child support was reduced by \$294 per month to account for the costs of travelling for parenting time. This is almost the exact amount that T.A.I. would pay in basic child support under the table amounts.
- [74] When considering whether to exercise my discretion, this symmetry between the agreed upon reduction in D.R.M.'s child support obligations and that which T.A.I. seeks now that E.M. is resident with D.R.M. is compelling. It dispels the concern that relieving T.A.I. of her basic child support obligations will be detrimental to the predictability and consistency objectives of the Federal Child Support Guidelines because the reduction is both predictable given the parties' previous agreement and consistent with that agreement.
- [75] It is in E.M.'s best interests to have parenting time with T.A.I.
- [76] For all of these reasons, I am persuaded that T.A.I. shall be relieved of basic child support retroactive to August 1, 2022.
- [77] Since child support is the right of the child, and financial circumstances can change, D.R.M. will have the right to review this matter. To facilitate that, the parties shall exchange updated financial statements by June 30 of each year. If D.R.M. seeks to review child support payable by T.A.I., he may do so on application brought no earlier than January 1, 2025. If he does so, the burden will be on T.A.I. to meet the test for undue hardship.

Section 7 Special and Extraordinary Expenses

- [78] T.A.I. raises several issues about expenses she has incurred on behalf of E.M. that she asserts D.R.M. should reimburse.
- [79] The background to this issue is that the September 2021 order is a comprehensive on these types of expenses. It provides for what are special and extraordinary expenses to be shared by the parties as follows:
- i. the portion of medical and dental insurance premiums attributable to her;
 - ii. health related-expenses that exceed insurance reimbursement by at least \$100 annually;
 - iii. extracurricular activities agreed to by the parties;

- iv. expenses for post-secondary education; and
 - v. other expenses must be agreed to between the parties in advance in writing including text or email prior to the expense being incurred.
- [80] The parties agreed to share special and extraordinary expenses provided for in the order with the claimant paying 30% and the respondent paying 70%. The amount to be shared was to be the expense after deducting tax benefits, deduction or subsidies associated with the expense.

Cell Phone

- [81] T.A.I. asserts that she has paid for E.M.'s cellphone since 2020 without any contribution by D.R.M. This type of expense would fall under the category of "other expense" that must be agreed to between the parties in advance. There is not evidence that this has been done or requested.
- [82] I conclude that in the circumstances of E.M. travelling between the Lower Mainland and 108 Mile Ranch monthly, and given that she should be able to communicate with both parents on a regular basis, a cell phone is an appropriate expense that the parties should be sharing. In the absence of evidence that they have discussed and agreed upon this as they agreed to do in the September 2021 order, it is not appropriate to make a retroactive order. I order this expense to be shared by D.R.M. paying 70% and T.A.I. paying 30% commencing December 1, 2023.

Migraine Medications and Supplements for E.M.

- [83] This is a medical expense. To the extent that it exceeds insurance reimbursement by at least \$100 annually, it shall be shared between the parties by D.R.M. paying 70% and T.A.I. paying 30% retroactively.

Dental and Orthodontic Treatments

- [84] T.A.I. seeks to be relieved of her agreement that she pay 30% of the orthodontic and dental treatments of E.M. She has not established a material change in circumstances that persuades me she should be relieved of this term of the September 2021 order.

Spousal Support

Legal Principles

- [85] The September 2021 order purports to deal with spousal support on a final basis. It does not provide for a review. It provides for a monthly amount and an end date.

[86] Some provisions of the September 2021 order were made pursuant to the Divorce Act and some were made pursuant to the Family Law Act. Other, like the spousal support provision, are made without stipulating which of those two pieces of legislation are made pursuant to. In the absence of such as stipulation, the use of both pieces of legislation in the order, and the default predominance of the Divorce Act, I am approaching this application to vary as if the spousal support provisions of the final order were made under the Divorce Act.

[87] Sections 17(1)(a) and (4.1) provide for and govern the variation of spousal support orders. They read as follows:

Variation order

17 (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, retroactively or prospectively,

(a) a support order or any provision of one, on application by either or both former spouses;

Factors for spousal support order

(4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

[88] Section 17 (4.1) has been interpreted to require a material change in circumstances. A material change in circumstance is one which, had those changed circumstances been extant or anticipated at the time the order was made, the order would not have been made on the same terms.

[89] If disability of a spouse is a material change of circumstances, then the court must go on to consider whether those circumstances justify a variation to the order.

[90] There are divergent approaches to spousal support where there is post-separation illness and disability as described in *Marthinsen v. Marthinsen*, 2020 BCSC 619 at paras. 48-62. In *Marthinsen*, Justice G.C. Weatherill identified a number of cases, including *G.W.C. v. K.C.C.*, 2015 BCSC 1802 and *Firth v. Firth*, 2012 BCSC 857 where post-separation disability has been factored in when making spousal support awards, but considered these cases to be the exception rather than the rule.

[91] In *Marthinsen*, G.C. Weatherill J. concluded that the dominant approach in British Columbia is to not make an exception to what the Spousal Support Advisory Guidelines would provide for spousal support even where there is post-separation illness or disability, citing *Powell v. Levesque*, 2014 BCCA 33. He also noted that the authors of the Spousal Support Advisory Guidelines endorse a "no exception" approach to disability cases as observed in *B.D.P. v. D.W.P.*, 2019 ONSC 949 at para. 75.

- [92] In *Fyfe v. Jouprien*, 2011 ONSC 5462, in which Justice Chappel identified some principles drawn from *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, 1999 CanLII 715 to guide the assessment of spousal support in such cases, including whether it is reasonable to expect the parties to continue to be 'safety nets' for each other in the event of post-separation need, and if so, for how long.
- [93] A review of the jurisprudence on how to determine whether there should be an exception to the spousal support provided for in the Spousal Support Advisory Guidelines in the event of post-separation disability discloses the following relevant factors:
- a) whether there is a connection between the disability and the marriage;
 - b) whether the case is one where the maximum time for spousal support has ended;
 - c) mutuality and interdependence, including whether the circumstances are such that is reasonable to make one spouse the insurer of the other;
 - d) the length of the relationship;
 - e) the time since separation; and
 - f) the objective of promoting self-sufficiency.
- [94] Based on the legal principles, T.A.I. must first establish a material change in circumstances and then must establish that her circumstances are such that there should be an exception to the spousal support agreed upon and to require D.R.M. to continue to provide a safety net for her.

Material Change in Circumstances

- [95] T.A.I. submitted that the material change in circumstance that warrants an increase and extension in spousal support is that she has been unable to return to work.
- [96] T.A.I. deposed that she was employed as a registered nurse from 2003 to 2018. She deposed she worked about 20 hours per week and was a homemaker, which allowed D.R.M. to work full time and advance his career.
- [97] T.A.I. deposed that she suffers from a number of health conditions. She deposed that for a number of years, she has had chronic migraines, generalized anxiety disorder and major depression. I infer from her affidavit that these conditions predated her 2015 diagnosis with fibromyalgia, which cause musculoskeletal pain, fatigue, panic attacks, difficulty breathing, dizziness, weakness and insomnia. She also deposed that she experiences brain fog, mild forgetfulness and mental fatigue.
- [98] T.A.I. deposed that due to her health issues, in August 2018, she was approved for long term disability from her employer's disability insurer, Canada Life. She deposed that she obtained disability status with Canada Pension in July 2021.

- [99] T.A.I. deposed that she hoped that moving to 108 Mile Ranch would also provide a pace of living that would improve her health and she deposed that one of her doctors, her neurologist, supported that view. However, she deposed that after her move, her health deteriorated such that her anxiety increased and she developed cardiac symptoms including high blood pressure, uncontrolled heart rate and progression of her depression. She also described gastro-intestinal problems including choking and problems swallowing food and a hiatus hernia.
- [100] T.A.I. has been under the care of neurologist, Dr. Robinson, for her chronic migraine headaches for many years. She also sees other specialists.
- [101] In October 2018, Dr. Robinson wrote a letter advising a gradual return to work with 4-hour shifts commencing after 10 am to usually hospital shift work. He also wrote that she would be starting a new preventative migraine treatment that he hoped would reduce the frequency and severity of her migraines. In December 2018, Dr. Robinson wrote that T.A.I. had started treatment and had a remarkable reduction in her chronic migraines. He stated that if all went well, she would be returning to work in February 2019. Apparently, that did not happen. In December 2019, Dr. Robinson wrote to T.A.I.'s family physician reporting again that she had improvement in her chronic migraines. At this juncture, he attributed it to leaving her stressful marriage, and that a return to work was definite possibility. He wrote another letter the same month recommending that she explore a gradual return to work.
- [102] In November 2020, T.A.I.'s long term disability provider wrote to her and described a rehabilitation plan including return to work focused counselling and a gradual return to work starting January 4, 2021. That return to work did not proceed.
- [103] On February 21, 2021, Dr. Robinson wrote a letter stating that T.A.I. had only had short periods of time when her headaches were less frequent. He wrote that there were no further measures to bring to bear on her headache disorder. He wrote that he did not believe she was capable of either full-time or part-time work as a registered nurse. He wrote that he believed that she should remain off work indefinitely.
- [104] In July of 2021, T.A.I. obtained disability status with the Canada Pension Plan.
- [105] T.A.I. had not returned to working at the time of the September 2021 order. T.A.I. deposed that she hoped that once the divorce and settlement was finalized, her health would improve.
- [106] It is noteworthy that T.A.I. has not deposed that she thought the improvement in her health would permit her to return to work. She did depose that one of the reasons she moved to 108 Mile Ranch was that the "hospital which had employment opportunities was only a 100-minute drive from my home" but she did not go on to say that she anticipated an improvement in her health that would permit her to return to work after she had been out of the workforce for over three years.

- [107] T.A.I. set out the clause of the September 2021 order in her affidavit explaining why she seeks a variance. In relation to that clause, she did not depose that she agreed to it on the understanding that she would be going back to work.
- [108] When T.A.I. applied for CPP disability benefits in May 2021, the application form that she signed defines disability as one that is both severe and prolonged such that the person is regularly stopped from doing any type of gainful employment and the disability is long-term, of indefinite duration, or is likely to result in death. This is evidence that a few months before the September 2021 order, T.A.I. was of the view that her disability was long term and of indefinite duration. Dr. Robinson signed the form and wrote on it that T.A.I. was "unable to maintain employment" but he also indicated that he expected her to return to work in 12 to 24 months.
- [109] In February 2023, T.A.I.'s neurologist, Dr. Robinson, wrote a letter describing that T.A.I. had chronic migraines since she was a teenager and that by 2016 she was struggling to work due to these migraines. He advised that stressful circumstances in her personal life had been a major aggravator to her headache disorder. He wrote that the incapacitating attacks made it impossible for her to continue working. He wrote that at that time, he believed it was in her best interest to stay off work indefinitely. He stated that it was possible that improvement in her emotional stress could result in a substantial decrease in headache that could possibility allow her to return to work at least part time as a nurse.
- [110] In May 2023, Dr. Robinson filled out a form to support continuation of long-term disability. He wrote on the form that the prognosis was depending on the resolution of an extremely acrimonious separation and that the "divorce agreement" was still pending. It is not clear what this was based on. The divorce, and the resolution of most issues except for E.M.'s ongoing residency and child support, were resolved through the September 2021 order. T.A.I. prolonged the proceedings relating to that resolution by bringing an unsuccessful application to have it set aside. She then refused to deal with the issue of E.M.'s residency by the June 30, 2022 date in the September 2021 order, and that refusal was the start of these acrimonious proceedings.
- [111] Accordingly, if Dr. Robinson's statement on the May 2023 form is correct, then T.A.I.'s conduct is detrimental to her chances of recovery. If there is a chance that her reduced emotional stress could allow her to work again, she is precluding that possibility from coming to fruition, through her conduct in refusing to implement the resolution she agreed to and refusing to address promptly the ongoing matters pertaining to E.M.
- [112] In any event, Dr. Robinson stated in February 2021 that T.A.I. should be off work indefinitely. I acknowledge that he allowed for the possibility of a return to work when he filled out the May 2021 CPP disability application, but there is no evidence as to how to square that with his statement made two months earlier that she would be off work indefinitely. In February 2023 he again stated that T.A.I. should be off work indefinitely.

- [113] Overall, it is impossible to say, on the medical evidence, that T.A.I.'s current health status and in particular being disabled from working was a circumstance that was not predictable in September 2021.
- [114] At best, it could be said that at that time, T.A.I. held out the hope that resolution of the matrimonial issues would benefit her health so she could return to work part time. But that can only be viewed as a hope. The actual circumstances were there she had been disabled from working for over three years. A return to work program had not proceeded. No other had been planned. No change in treatment or new treatment was planned. She and her doctors hoped that reduced stress would improve her situation but it did not. When considered with the evidence that the end of the conflict in these proceedings was the basis for the hope, it cannot be said that there has been a material change in circumstances given that T.A.I.'s conduct, at least in part, has prevented that hope from being realized.
- [115] T.A.I.'s health circumstances have not changed materially from when she agreed to spousal support at the amount she agreed for the duration she agreed and there was no identified medical rationale to expect that they would improve.
- [116] T.A.I. also points to her accumulation of debt and the perilous financial situation she faces. She deposed that she did not receive the funds agreed to in the November 2020 order for the division of property until January 2021 and then a second tranche in May 2021. She deposed that as a result, she incurred debt with interest compounding between March of 2019 and May of 2021 to cover her monthly expenses.
- [117] I cannot reconcile this evidence specifically with the evidence that she was living in the family home until the fall of 2020 where her housing costs at least were covered and when she moved out, she started receiving spousal support.
- [118] The evidence is that T.A.I.'s adult cousin lives in T.A.I.'s home at 108 Mile Ranch. The evidence is that he had loaned T.A.I. money, and does work around the property, but does not pay towards the shelter expenses. Based on T.A.I.'s F8 financial statement, if she were to require the other adult living in the home to pay one half of the utilities and the interest expense on the mortgage, she would be a long way forward in making her monthly ends meet. While this does not relate to a material change in circumstances, had I found one, it would have been necessary for T.A.I. to address this in more detail in order to establish that the material change has caused a situation requiring that her spousal support be increased and extended.
- [119] T.A.I. has not established a material change in circumstances that justify the court entertaining a change to the September 2021 order for spousal support. There is no need to consider whether higher spousal support or indefinite spousal support is warranted based on post-separation disability.
- [120] I dismiss T.A.I.'s application for an increase to spousal support and extension of spousal support.

Other Matters - RRSP Roll-Over, Dental and Costs

- [121] T.A.I. asserts that D.R.M. has contravened the September 2021 order by failing to undertake the spousal rollover of his RRSP provided for in that order.
- [122] The evidence is that promptly after the September 2021 order was finally entered in May 2022, D.R.M. communicated with T.A.I. about that. The communications show that he has determined what steps have to take place to affect the rollover and has tried to arrange to do that with T.A.I. but she has not cooperated. He has tried both to communicate with T.A.I. and her lawyer about this to no avail.
- [123] D.R.M. points to the fact that he was awarded costs of the application before Justice Gibb-Carsley. He had prepared a bills of costs. The costs are slightly less than the RRSP roll-over. He sensibly suggests offsetting one against the other.
- [124] T.A.I. seeks reimbursement of dental invoices totalling \$1,547.30. She agrees to this being offset against her costs' payment. She does not agree to the RRSP rollover from being offset.
- [125] The RRSP rollover is provided for in the September 2021 order. If I make an order that it not be rolled over, with the amount of the rollover offset against a subsequent costs award, I would be varying the September 2021 order. Accordingly, I would have to be satisfied that a material change in circumstances justifies a variance. No evidence or submissions have been made to me that meet the test for a material change in circumstances in regards to the RRSP rollover.
- [126] I decline to make an order varying the requirement for D.R.M. to affect the RRSP rollover. I am also not going to make the order that T.A.I. seeks that it be done by a certain date. D.R.M. has attempted to do it. T.A.I. has frustrated those attempts. She should stop frustrating those attempts and cooperate with D.R.M. to affect the rollover.
- [127] T.A.I. seeks an order that D.R.M. reimburse her for dental expenses she incurred totalling \$2,077.00. She claims that she paid for the dental expenses but she was covered on D.R.M.'s dental benefits. She deposed that she has been advised by Blue Cross that a cheque was issued to D.R.M. for those expenses. D.R.M. deposed that he received \$1,503.90 in reimbursement from Blue Cross. He deposed that he withheld the amount from T.A.I. because she had not repaid him money she promised to repay him in October 2020.
- [128] It is not appropriate for the parties to deal with these matters in this way. If D.R.M. wants to pursue the money he says he loaned to T.A.I. in October 2020 and for some reason did not account for it in the subsequent orders they have made and had entered, he can do so. But he is not entitled to holdback a reimbursement for dental care that T.A.I. paid for.
- [129] I order that D.R.M. pay T.A.I. \$1,503.90 regarding dental claim reimbursements he has received for dental services she paid for forthwith. T.A.I. is agreeable to offsetting that payment against the costs payable pertaining to the application before Justice Gibb-Carsley. I so order.

Disposition

- [130] As of August 1, 2022, E.M. was primarily resident with D.R.M. She shall continue to be primarily resident with D.R.M. unless and until further order of the court or agreement of the parties in writing.
- [131] D.R.M.'s obligations to pay basic child support as set out in the September 2021 order ceased as of July 2022. Any arrears of child support accumulated August 1, 2022 forward shall be cancelled.
- [132] T.A.I.'s parenting time with E.M. for the period December 1, 2023 through December 31, 2024 is as follows:
- a) November 10 to 12, 2023 in 108 Mile Ranch;
 - b) December 23, 2023 to January 1, 2024 in 108 Mile Ranch;
 - c) once per month in 108 Mile Ranch from January 2024 to November 2024; and
 - d) T.A.I. will have five weeks of parenting time with E.M. over the summer based on dates to be agreed upon by April 1 of each year subject to E.M.'s wishes and school schedule.
- [133] Starting in December 2024, the parties will rotate Christmas parenting time as follows:
- a) E.M. will have parenting time with T.A.I. on Christmas Day on odd years and with D.R.M. on even years; and
 - b) T.A.I. will have 9 consecutive days of parenting time during Christmas Holidays with the time and date to be agreed upon on or before November 15 of the same year.
- [134] The parties will see a Family Justice Counsellor by the end of July 2024 to attempt to agree on dates for 2025 based on the model set out above.
- [135] T.A.I.'s application to be relieved of child support based on undue hardship is allowed retroactive to August 1, 2022, subject to review on application by D.R.M. If D.R.M. seeks to review T.A.I.'s relief from paying child support, he may do on application brought after January 1, 2025. If D.R.M. brings such an application, the onus shall remain with T.A.I. to prove undue hardship.
- [136] With regard to special and extraordinary expenses:
- a) the parties shall share the expense of E.M.'s cell phone on a go forward basis in accordance with the September 2021 order;
 - b) the parties shall share the expenses of supplements and prescriptions for E.M.'s headaches and migraines retroactively in accordance with the September 2021 order; and
 - c) T.A.I.'s application to be relieved of her share of dental and orthodontic expenses for E.M. is dismissed.

- [137] T.A.I.'s application to vary the September 2021 order to increase monthly spousal support and extend spousal support past September 2025 is dismissed.
- [138] D.R.M.'s obligation to pay T.A.I. \$1,503.90 regarding dental claim reimbursements he has received for dental services she paid for shall be offset against the costs payable by T.A.I. to D.R.M. pertaining to the application before Justice Gibb-Carsley.

"Matthews J."

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